STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2014
v KEVIN JUNE MCCONER, Defendant-Appellant.	No. 309421 Wayne Circuit Court LC No. 11-009624-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v WILLIAM LEWIS SMITH, Defendant-Appellant.	No. 309422 Wayne Circuit Court LC No. 11-009624-FC

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

Defendants Kevin McConer and William Smith were tried jointly, before separate juries. Both defendants were convicted of second-degree murder, MCL 750.317. The trial court sentenced defendant McConer to 20 to 40 years' imprisonment, and sentenced defendant Smith as an habitual offender, fourth offense, MCL 769.12, to 50 to 80 years' imprisonment. Both defendants appeal as of right. We affirm.

I. BASIC FACTS

Defendants' convictions arise from the fatal beating of 52-year-old Dale Glenn outside defendant McConer's Detroit home in the late evening of July 28, 2011. The prosecutor's theory at trial was that defendants Smith and McConer beat Glenn because they suspected him of stealing. The prosecution's principal witness, DB, was sitting outside defendant McConer's house during the offense. According to DB, as Glenn was walking down the street, defendant Smith called him over. When Glenn approached, defendant Smith struck Glenn in the head with

a 40-ounce beer bottle, causing Glenn to fall to the cement sidewalk. Defendant Smith then kicked and stomped Glenn several times in his head and face. Defendant McConer, who had been barbequing nearby, then walked over and joined in the assault by kicking Glenn in the lower part of his body. Both defendants stopped the beating because of oncoming cars. The defendants then carried Glenn across the street and left him in a vacant field. Glenn was discovered and taken to the hospital where he died on July 30, 2011, from blunt force head trauma. The defense theory for both defendants was that they were not involved in Glenn's death. Both defendants argued that DB, who admittedly had consumed 160 ounces of beer that evening, and the other prosecution witnesses were not credible. They were convicted and sentenced as outlined above and now appeal as of right.

II. DOCKET NO. 309421 (DEFENDANT MCCONER)

A. PROSECUTORIAL MISCONDUCT

Defendant McConer argues that the prosecutor denied him a fair trial and due process by injecting unfounded assertions of witness intimidation throughout the trial. We disagree.[1]

We review preserved claims of prosecutorial misconduct case-by-case by examining the challenged conduct in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Our review of unpreserved claims of prosecutorial misconduct is limited to plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

1. OPENING STATEMENT

Defendant McConer argues that the prosecutor improperly made numerous "unfounded assertions" in her opening statement that witnesses had been intimidated.

A prosecutor may not inject "unfounded or prejudicial innuendo into the proceedings." *People v MG*, 130 Mich App 174, 180; 342 NW2d 908 (1983). "The purpose of an opening

[1] Some, but not all, of defendant McConer's arguments are preserved. In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Although defendant McConer objected to the prosecutor's opening statement, he did not do so until after the jury had been excused for the day. Therefore, the objection was untimely and although the trial court belatedly gave a curative instruction, the issue is unpreserved. Defendant McConer objected to certain questions during MG's testimony, thereby preserving that portion of his claim. Defendant McConer did not object to the prosecutor's closing argument, leaving that issue unpreserved.

statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976).

The prosecutor included the following statements during her opening:

> . . .you're going to hear evidence in this case from several witnesses and what I'm going to talk about briefly at this point in time, I think what you're going to see is a very overwhelming scene in this case in that *nobody wants to be involved.*
>
> You've got on one hand two people, this Defendant and the other Defendant . . ., and then you have people in the neighborhood who are witnesses who—and I'm not going to cast dispersions on them—*they don't want to be involved*.
>
> * * *
>
> You're going to hear from one witness, *[DB], who, very clearly, did not want to be involved*, did not go to the police. Ultimately the police found out he was a witness and went to him. Didn't want to be involved.
>
> Ultimately you're going to hear testimony that the Prosecutor's Office in conjunction with the police *had to get a court order from the Judge to order him to give testimony*—it's kind of like a deposition—testimony under oath subject to penalty of perjury just as if he were in a courtroom.
>
> You're going to hear very clearly that he still doesn't want to be involved and I think that will be very apparent to you as you watch him. You're going to hear about the fact that he has previously not only testified in an investigative subpoena procedure under oath, but he also previously testified at a preliminary examination and what I would suggest to you in furtherance of *his desire not to be involved and in furtherance of his trying to obstruct the process, to protect himself and his family*, he, at that preliminary examination, said, well, you know, the prosecutor told me I had to say X, Y Z, where [sic] they said they were going to lock me up, but you're also going to see as he was asked further questions indicated, he admitted that wasn't really true.
>
> * * *
>
> . . . . You're also going to hear from an elderly lady who lived in the neighborhood, [MG], seventy-four years old. You're going to hear testimony from her that earlier in the evening she called 911 and you're going to hear that she, too, *is very displeased about being involved* in this procedure.
>
> You're going to hear, I suspect, she will not hesitate to tell you that *the police promised that her name wouldn't be used and they used it and she doesn't want to be here and she's afraid they're going to kill her family*. That's what you're going to hear from [MG].

* * *

> Lastly, you're going to hear from a third civilian witness who is [Glenn's nephew] . . . Even [Glenn's nephew] doesn't want to be involved. . . .

The prosecutor did not act in bad faith when she made the challenged statements. Evidence and arguments relating to the credibility of witnesses is proper and admissible. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). "If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact." *Id.* Evidence of threats, even if not directly connected to the defendant, is relevant to witness bias when there is an indication that the witness was reluctant to testify against the defendant, *People v Johnson*, 174 Mich App 108, 112; 435 NW2d 465 (1989), or to explain inconsistencies in a witness's behavior or statements. *People v Clark*, 124 Mich App 410, 412-413; 335 NW2d 53 (1983).

The prosecutor's statements reasonably anticipated the evidence that was produced at trial. DB, MG, and Glenn's nephew each clearly and repeatedly testified that they did not want to be involved in this case. Glenn's nephew testified that he did not want to come to court, and that he did not contact the police after finding out what happened to his uncle. DB testified that he did not initially go to the police, that the police had to come to him, that he initially refused to testify, and that he was testifying pursuant to a subpoena. Outside the presence of the jury, the trial court noted that DB was "sitting back slouching in his chair acting like he doesn't want to participate in the line of questioning." Although DB's testimony that he wanted to avoid any involvement because of fear for himself and his family was elicited in front of defendant Smith's jury only, the testimony supports that the prosecutor's remarks in opening statement were made in good faith. Defendant McConer's defense was not prejudiced where defense counsel used the lack of proof in this regard to argue that DB was simply a reluctant witness.

MG testified she did not want her name revealed. Although MG denied making a statement to the police that she was afraid that her family would be killed as a result of her involvement, there was no evidence that the prosecutor acted in bad faith when making the statement. The prosecutor explained that MG had told her repeatedly that she was afraid to testify for fear that her family would be harmed. During trial, in addition to denying having made that statement, MG also denied making many other statements to the police. MG testified that she did not want to testify because of a general fear of "things happen[ing] to people," and "hear[ing] of people getting killed and stuff by being a witness and stuff." The investigating officer testified that he did tell MG that he was putting her name in the report because of "[f]ear for her safety." Also, at one point during MG's testimony, the court stopped the proceedings and excused the juries to deal with an audience member who was "starring down" the elderly witness. This record discloses that the prosecutor was not acting in bad faith when she indicated to the jury that the evidence would show that MG feared that her family would be killed if she testified. Moreover, defendant McConer was not prejudiced because defense counsel extensively cross-examined MG, eliciting that a fear that her family would be killed was nowhere in her police statement, that she would have fear about being involved in any homicide case, and that it was not this specific case that made her reluctant to testify because she would not want to be a witness or come to court and testify in any case. Defense counsel also elicited

that there was nothing that would have stopped MG from "taking off" had she been that afraid to testify.

Furthermore, pursuant to defendant McConer's belated request, before any witnesses were called, the trial court instructed the jury that opening statements are not evidence, and also reinstructed the jury about what constitutes evidence. In its final instructions, the court again instructed the jury on what it was allowed to consider as evidence, and also that the lawyers' statements are not evidence and that it was to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

2. THE PROSECUTOR'S QUESTIONING OF MG

Defendant McConer presents excerpts from the prosecutor's direct examination of MG, which he argues were a continuation of the prosecutor's improper theme of witness intimidation and fear. Although there was no evidence that MG was threatened by the defendants, the evidence was not elicited to demonstrate defendant McConer's consciousness of guilt.[2] Rather, it was elicited to address MG's credibility. *Johnson*, 174 Mich App at 112; *Clark*, 124 Mich App at 412-413.

The record discloses that MG, believing that her name would not be used, gave detailed statements to the police regarding her observations of her next-door neighbor, defendant McConer, on the day of the incident. However, MG's identity as a witness was later revealed. At trial, MG was reluctant to answer the prosecutor's questions, insisted that she could not recall certain observations, and denied ever making several statements to the police. For instance, she denied telling the police that defendant McConer matched the description of one of the two men she observed carrying an object into the street, and that she believed that the object was a body. Outside the presence of the jury, the trial court commented that it was apparent that MG was reluctant, "not telling the truth," "holding back on her testimony," and "not cooperating." Defendant McConer makes much of the fact that MG denied at trial that she told a police officer that she feared for her family's life. Given the record, however, it is not remarkable that MG denied making that statement as well. Moreover, despite her denial, the prosecutor's inquiries into the possibility of intimidation were proper because the issue of MG's concern for her and her family's safety tended to explain the reason for MG's inconsistent cooperation and statements and bore directly on her credibility as a witness. *Mills*, 450 Mich at 72. Therefore, the prosecutor's questions, which sought to elicit a permissible subject related to witness credibility, were not clearly improper.

3. CLOSING ARGUMENT

[2] A defendant's threats against a witness are relevant and admissible to demonstrate the defendant's consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). For such evidence to be considered, the threats must be connected to the defendant. *People v Walker*, 150 Mich App 597, 603; 389 NW2d 704 (1985); *People v Lytal*, 119 Mich App 562, 576-577; 326 NW2d 559 (1982).

Defendant McConer argues that several remarks during closing argument were also unfounded and improper.

Plaintiff concedes, and we agree, that the prosecutor's remark that Glenn's nephew "knows that if he comes to court and testified there are ramifications for that" is unsupported by the evidence. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Thus, defendant McConer has established a plain error. However, he also has the burden of establishing that this error affected his substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006); *Carines*, 460 Mich at 752-753, 763-764. And reversal is warranted only if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *Id.* at 752-753, 763-764.

Contrary to defendant McConer's contention, the prosecutor did not indicate what "ramifications" Glenn's nephew thought he faced. The prosecutor did not indicate that the witness would be harmed, but discussed how he was "torn" because the incident involved a friend who was like a family member and an actual relative. The prosecutor asserted throughout trial that Glenn's nephew did not want to be involved, and Glenn's nephew testified that the situation was "hard." Moreover, the nephew did not provide the crucial testimony that inculpated defendant McConer. Considering the limited relevance of the nephew's testimony, and the trial court's instructions that the lawyers' statements and arguments are not evidence, there is no reasonable likelihood that the prosecutor's improper statement caused defendant McConer's conviction. Therefore, defendant McConer is not entitled to a new trial because of the prosecutor's improper remark.

With regard to the remaining claims, viewed in context, the challenged remarks were based on the evidence and reasonable inferences arising from the evidence as they related to the prosecutor's theory of the case. *Bahoda*, 448 Mich at 282. The prosecutor argued:

> Now, you looked at [DB], and you watched him testify. I don't blame you for thinking he's kind of a pain in the neck to deal with. I probably would agree. But that does not make him a liar.
>
> And what you have to do, what I ask you to do, is to carefully follow the witness credibility instruction that [the trial court] is going to give you, because it gives you some good idea of how you resolve questions about witness credibility.
>
> *I told you in the beginning of this case that nobody wanted to be involved. And that is exactly what we have found in this case. And I don't know how it could have been demonstrated more explicitly than by [MG] in that witness chair.*
>
> *I know that in addition to listening to the evidence and watching the witness's demeanor, you saw everything that went on in this courtroom.*
>
> [MG] is the kind of person who is frankly the heart and soul of the community. Because although she wanted to come to court and say, well, I didn't see, I couldn't tell, I don't really pay attention, she kind of betrayed herself in a

> way when she admitted, well I—when I was asking her, what made you go in the door to look. She kind of betrayed the fact that that she's the kind of lady in the neighborhood that's watching everything. She said sometimes I just go to the door to look out. And that's what she said. And to say that she went to the door to look out, and didn't wear her glasses, and couldn't see, and it was dark, ladies and gentlemen, I would suggest to you that *you have to consider that very carefully in the context of which all this is happening.*
>
> And you saw everything that went on in this courtroom.
>
> *The fact that [MG] does not want to come to court does not make her a liar. It makes her a survivor.*
>
> And you heard the testimony of Officer Rutledge, when he came in here and said, I talked to [MG], and she told me again and again she didn't want her name used. *Pretty smart on her part . . . .*
>
> ***
>
> Now, you heard defense counsel say, well, why didn't you go there and take measurements from her house. Why didn't you, I don't know, go and stand in her doorway and looks and see what you could see. *What do you think would have happened if they would have done that? [MG] would be exposed as being the person who told on Little Boo. The relative of the—Boo comes to court and positions himself where she can see him.*

Prosecutors are afforded great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). They may argue the evidence and all reasonable inferences that arise from the evidence as it relates to their theory of the case, and they need not state their inferences in the blandest possible language. *Bahoda*, 448 Mich at 282; *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). They are free to argue from the facts and testimony that a witness is credible or worthy of belief. *Id.* Further, an otherwise improper remark might not warrant reversal if the prosecutor is responding to the defense counsel's argument. *Id.* at 64.

The prosecutor's remarks concerning MG, DB, and Glenn's nephew not wanting to be involved or come to court were based on the witnesses own testimony and the testimony of police witnesses concerning their lack of cooperation or coming forward. Further, the prosecutor's remarks regarding how MG's reluctance to testify affected her credibility were based on reasonable inferences from the evidence elicited during the prosecutor's questioning of MG, and were not improper. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Further, the prosecutor's speculation about what would have happened had the police took measurements outside of MG's residence was responsive to defense counsel's assertions during trial that the police did not fully investigate the matter. When making the challenged remarks, the prosecutor urged the jury to evaluate the evidence, discussed the reliability of the prosecution witnesses' testimony, and argued that there were reasons from the evidence to conclude that defendant McConer was guilty of the charged crimes. The prosecutor's arguments were not clearly improper. Furthermore, the trial court's instructions to the jury that the lawyers'

statements and arguments are not evidence, that it was to decide the case based only on the properly admitted evidence, and that it was to follow the court's instructions were sufficient to dispel any possible prejudice. *Long*, 246 Mich App at 588.

B. VOIR DIRE

Defendant McConer argues that he is entitled to a new trial because the trial court conducted the jury voir dire itself, refused to use the voir dire questions prepared by defense counsel, and improperly admonished prospective jurors who admitted partiality. We disagree.

It is within the trial court's discretion to conduct voir dire itself, and, thus, this Court reviews challenges concerning voir dire for an abuse of discretion. MCR 6.412(C)(1); *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *Id.* at 618; see also *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). There are no "hard and fast rules" regarding what constitutes acceptable voir dire; rather, the trial court is granted wide discretion in the manner employed to achieve an impartial jury. *Sawyer*, 215 Mich App at 186-187. A defendant does not have the right to have counsel conduct voir dire or to any other specific procedure for voir dire. *Tyburski*, 445 Mich at 619; *Sawyer*, 215 Mich App at 191. "[W]here the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *Tyburski*, 445 Mich at 619. The trial court is required "to conduct a thorough and conscientious voir dire[.]" *Id*. at 623.

Here, the trial court's voir dire provided defendant McConer with a reasonable opportunity to ascertain whether any of the potential jurors were subject to peremptory challenge or challenge for cause, and also provided the trial court with sufficient information to make an independent assessment of bias and to guard against potential bias. The court covered the salient concepts of the presumption of innocence, burden of proof, and reasonable doubt, and elicited relevant information regarding the prospective jurors' backgrounds. The court also clearly instructed the jurors that a verdict could not be based on emotion or sympathy, and asked the prospective jurors if they were "going to be able to promise [] that [they're] not going to allow sympathy to enter into [their] deliberations. Do you all understand that?" The court then asked for a show of hands of those who could do so. The record reveals that all jurors raised their hands. In addition, although the trial court denied defense counsel's request that he conduct voir dire, the attorneys were permitted to approach the bench and request other specific questions they wanted the court to ask the prospective jurors. Defense counsel did not avail himself of this option, but merely generally objected. Even on appeal, defendant McConer has not identified any relevant question that the trial court failed to give.

In any event, defendant McConer was not entitled to have questions tailored precisely as he would have liked. He was entitled only to a thorough and conscientious voir dire that would allow him to intelligently exercise his challenges to the prospective jurors. *Tyburski*, 445 Mich at 623. The record discloses that this was done. As a result of the court's voir dire, defendant McConer used 10 of his 12 peremptory challenges. The court also dismissed prospective jurors for cause. Thus, we find no abuse of discretion in the general manner in which the trial court

conducted voir dire. The manner in which the court conducted voir dire was sufficient to provide defendant McConer with a reasonable opportunity to ascertain whether any of the prospective jurors were not impartial.

Within this issue, defendant McConer also argues that the trial court improperly admonished two prospective jurors who expressed partiality. One prospective juror did not want to sit on a homicide case and ultimately stated that he could not be fair. The other prospective juror simply did not want to be in court, considered himself at age 61 an old person who should not have to come to court to serve on a jury, had been convicted three times for drunk driving and did not think that he had been fairly treated one of those three times, and ultimately said he could not be fair. Because defendant McConer did not object to the manner in which the court questioned these prospective jurors, our review is limited to plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

We find nothing prejudicial about the trial court addressing either juror's position. When the prospective jurors gave their reasons about why they could not serve, the trial court merely explored their reasons to ensure clarity and made comments within the context of discussing those reasons. The trial court's comments were within the discretion afforded it, and the trial court ultimately excused both prospective jurors for cause. Defendant McConer has not demonstrated that the trial court's voir dire of the two excused jurors tainted the impartiality of the remaining jury panel. Each seated juror stated that he or she could be impartial and would follow the court's instructions. Therefore, defendant McConer has failed to establish a plain error.

C. STANDARD 4 BRIEF

Defendant McConer raises an ineffective assistance of counsel claim in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. Because defendant McConer did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). The defendant has the burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it

'deprives the defendant of a substantial defense.'" *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (citation omitted). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996).

To the extent that defendant McConer relies on the affidavits of Louisa Taylor and David Bowers, because those affidavits are not part of the lower court record, we may consider them only to determine whether remand for an evidentiary hearing might be appropriate. See *People v Moore*, 493 Mich 933; 825 NW2d 580 (2013). Whether to grant a request to remand is within the discretion of this Court, and this Court may consider whether the requesting party has demonstrated that the issue is meritorious. *People v Hernandez*, 443 Mich 1, 14-15; 503 NW2d 629 (1993), abrogated on other grounds *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997). Remand is proper if a factual record is required for appellate consideration of the issue. See MCR 7.211(C)(1)(a)(ii).

We conclude that defendant's argument does not establish ineffective assistance of either trial or appellate counsel. Moreover, the submitted affidavits do not provide factual support for defendant McConer's argument that the alibi witnesses' testimony could have provided a substantial defense by showing that defendant McConer was not involved in the attack against Glenn. The proposed witnesses contacted defense counsel and indicated a willingness to testify on defendant McConer's behalf. We cannot conclude that defense counsel's failure to present the proposed witnesses at trial was anything less than sound trial strategy, likely based on counsel's credibility assessment. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999) ("Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.")

Similarly, it is clear that appellate counsel was also advised of the potential witnesses and declined to either request an evidentiary hearing in the trial court or to pursue the issue on appeal. *People v Uphaus*, 278 Mich App 174, 187; 748 NW2d 899 (2008) ("Given the overwhelming evidence of guilt, defendant's appellate counsel could properly conclude that defendant's trial counsel's decision not to call [certain] witnesses . . . likely did not affect the outcome of defendant's trial. Because of this, defendant's appellate counsel could reasonably conclude that this issue did not warrant appellate consideration.") It is appropriate for appellate counsel to "winnow out weaker arguments in order to focus on those arguments that are more likely to prevail." *Id.* at 186-187.

II. DOCKET NO. 309422 (DEFENDANT SMITH)

A. SUFFICIENCY OF THE EVIDENCE

Defendant Smith argues that his conviction for second-degree murder must be vacated because the prosecution failed to present sufficient evidence that he aided and abetted codefendant McConer in committing the crime. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[A] reviewing court is

required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted).

Evidence was presented that defendant Smith, in conjunction with codefendant McConer, participated in an unprovoked attack against 52-year old Glenn, who was suspected of stealing. According to DB, an eyewitness, as Glenn was walking across the street, defendant Smith summoned him over. When Glenn approached, defendant Smith struck him in the head with a 40-ounce glass bottle, causing Glenn to immediately fall onto the cement sidewalk. Defendant Smith immediately started stomping and kicking Glenn in the head and face. As defendant Smith was repeatedly kicking Glenn in the head, codefendant McConer joined in the beating by kicking Glenn in his lower extremities. During the approximate three-minute pummeling, Glenn was always on the ground, never sat up, never said anything, and never fought back. The beating ceased because cars were approaching. The defendants picked up the trampled Glenn and carried him across the street to a vacant field, where they kicked him again, and then left. Upon coming back across the street, defendant Smith expressed, "That's what you get for stealing." There was testimony that after the beating, Glenn was unrecognizable and looked as though he had been stomped on, his eyes were swollen, one eye was nearly out of the socket, and his jaw appeared fractured, and he had a gash from the top of his head to nearly his forehead. Medical evidence revealed that Glenn suffered multiple skull fractures, extensive hemorrhaging in the skull, and a severe injury to his right eye, which partially "extruded" from the eye socket, all caused by multiple blows to the head and eye. Glenn later died from multiple blunt force head trauma.

From this evidence, a jury could reasonably infer that defendant Smith delivered the fatal blows that caused Glenn's death. The evidence that defendant Smith struck Glenn with a 40-ounce bottle without warning, and that, once Glenn fell on the cement ground, defendant Smith repeatedly stomped and kicked Glenn in the head (without any resistance from Glenn), and that defendant Smith thereafter carried Glenn to a vacant field where he was left unattended and in the dark, was sufficient to permit a rational trier of fact to reasonably infer that defendant Smith possessed the required malicious intent for second-degree murder and caused Glenn's death. Although defendant Smith suggests alternative ways of viewing the evidence, it was up to the trier of fact to evaluate the evidence. For purposes of resolving this sufficiency challenge, this Court is required to view the evidence in a light most favorable to the prosecution. *Wolfe*, 440 Mich at 515. Defendant Smith emphasizes that no broken glass, presumably from the beer bottle used to deliver the first blow, was found at the scene or in Glenn's scalp. Defense counsel addressed this matter at trial, and witnesses offered explanations regarding the lack of evidence. More importantly, the credibility of DB's testimony was for the jury to determine, *id.* at 514, and the jury was entitled to accept or reject any part of it. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Viewed in a light most favorable to the prosecution, the evidence was

sufficient to sustain defendant Smith's conviction of second-degree murder. At trial, the prosecutor advanced the theory that each defendant was guilty of second-degree murder as a principal or an aider or abettor. Although the thrust of defendant Smith's argument on appeal is that the evidence was insufficient to convict him under an aiding and abetting theory, there was overwhelming evidence that he directly committed the offense.

Defendant Smith's sufficiency argument made in his Standard 4 brief regarding the inadmissibility of MG's "hearsay" statements does not affect the sufficiency of the evidence or compel a different result. The purpose of a sufficiency of the evidence inquiry is to determine whether the jury acted rationally based on the evidence before it, not whether improperly admitted evidence violated a defendant's due process rights. *McDaniel v Brown*, 558 US 120, 130; 130 S Ct 665, 672; 175 L Ed 2d 582 (2010). Thus, when reviewing the sufficiency of the evidence, this Court must consider all the evidence admitted during trial, even if it was erroneously admitted. *Id.* Accordingly, this Court may consider MG's statements regardless of whether they were technically admissible. However, the statements do not affect the sufficiency of the evidence. The critical evidence against defendant Smith came from DB's testimony and the medical evidence, which was sufficient to allow a rational jury to find that the prosecution proved each element of second-degree murder beyond a reasonable doubt.

B. ADMISSION OF PHOTOGRAPHIC EVIDENCE

Defendant Smith argues that the trial court abused its discretion in admitting two graphic photographs, one depicting Glenn's eye protruding from the socket and the other depicting Glenn's exposed skull with several fractures. We disagree. The decision whether to admit photographic evidence is within the sole discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Mills*, 450 Mich at 76; *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998).

Photographs that are calculated solely to arouse the sympathies and prejudices of the jury may not be admitted. *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997). The question is whether a photograph is relevant under MRE 401 and, if so, whether its probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. *Mills*, 450 Mich at 67-68. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "A trial court admits relevant evidence to provide the trier of fact with as much useful information as possible." *People v Cameron*, 291 Mich App 599, 612; 806 NW2d 371 (2011).

Here, the photographs were admissible to corroborate the medical examiner's and DB's testimony. *Mills*, 450 Mich at 71-72. The photographs were instructive in depicting the location, nature, and severity of the injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Defendant Smith was charged with second-degree murder, and, as previously discussed, a malicious intent is an essential element of that offense. *Smith*, 478 Mich at 70. Contrary to defendant Smith's suggestion, the fact that he did not dispute the cause of death does not render the photographs inadmissible. See *Mills*, 450 Mich at 71. Further, "[p]hotographs are not excludable simply because a witness can orally testify about the information contained in the photographs." *Id.* at 76.

Moreover, a relevant photograph is not inadmissible merely because of its gruesome or shocking nature. *Id.* Here, the photographs depicted a large gash on the right eye and the presence of cracks in Glenn's exposed skull, but depicted little other graphic detail and were not overtly gruesome. It is apparent from the record that the trial court weighed the probative value of the photographs against their potentially prejudicial nature. See *People v Herndon*, 246 Mich App 371, 413-414; 633 NW2d 376 (2001). We cannot conclude that the trial court abused its discretion in admitting the photographic evidence.

C. IMPROPER OPINION TESTIMONY

Defendant Smith argues that he is entitled to a new trial because, in response to defense counsel's question, Sgt. Michael McGinnis impermissibly expressed his opinion that DB was a truthful witness. There was no objection to the witness's response at trial, leaving this issue unpreserved. Therefore, we review this claim of error for plain error affecting defendant Smith's substantial rights. *Carines*, 460 Mich at 763-764

During defense counsel's cross-examination of Sgt. McGinnis, the following exchange occurred:

> *Q.* And so for the first time in this complete case we hear [DB], on the witness stand say, "Oh, by the way the bottle that I saw swung by somebody just happened to break and shatter." Is that right?
>
> *A.* I wouldn't say he said it so matter of factly, it was kind of like he blurted it out.
>
> *Q.* Of course, we never know if [DB] was telling the truth about that or not, do we?
>
> *A.* I believe he was.

As defendant Smith notes, it is generally improper for a witness to provide an opinion regarding the credibility of another witness during trial because credibility is a determination for the trier of fact. *Dobek*, 274 Mich App at 71. However, "[u]nder the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error." *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004). Here, McGinnis's challenged statement was responsive to defense counsel's question. Moreover, defense counsel did not object to McGinnis's response, but instead continued with his questioning, asking a question about how the officer knew that the witness was truthful, to which the prosecutor objected. Accordingly, because defendant Smith invited the alleged error and did not object to the response, defendant Smith "lost his right to assert this issue on appeal." *Id.* at 139.

We also reject defendant Smith's related argument that defense counsel was ineffective for failing to move for a mistrial on the basis of McGinnis's response to defense counsel's question. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citation omitted). As plaintiff accurately observes, there is nothing

"irregular" about defendant Smith receiving a responsive answer to a question posed by his own counsel, and he has not persuasively argued that the sergeant's answer was sufficiently prejudicial to impair his ability to receive a fair trial. Accordingly, there was no viable basis to move for a mistrial, and defense counsel cannot be deemed ineffective for failing "to advocate a meritless position." See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

D. STANDARD 4 BRIEF

In a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant Smith raises four additional issues, none of which have merit.[3]

1. GREAT WEIGHT OF THE EVIDENCE

Defendant Smith argues that his convictions must be reversed because the evidence preponderates so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand. We disagree. Because defendant Smith failed to raise this issue in a motion for a new trial, our review is limited to plain error affecting defendant Smith's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

A new trial may be granted if a verdict is against the great weight of the evidence. *People v Brantley*, 296 Mich App 546, 553; 823 NW2d 290 (2012). In evaluating whether a verdict is against the great weight of the evidence, a court must determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A verdict may be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (internal quotation marks and citation omitted). Absent compelling circumstances, the credibility of witnesses is for the jury to determine. See *Lemmon*, 456 Mich at 642-643.

Considering the evidence that defendant Smith gratuitously struck Glenn in the head with a bottle, causing him to fall to the ground, and proceeded to repeatedly stomp and kick him in his head and face, and that Glenn died as a result of receiving multiple blows to his head, the evidence does not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand. *Lemmon*, 456 Mich at 647. Defendant Smith's great-weight arguments essentially consist of an attack on the prosecution witnesses' credibility. Conflicting testimony and questions regarding the credibility of witnesses are not sufficient grounds for granting a new trial. *Id.* at 643. The jury was aware of the potential issues with the witnesses' testimony, and defendant Smith cross-examined the witnesses at length and presented credibility arguments to the jury. A reviewing court should ordinarily defer to the jury's determination of credibility "unless it can be said that directly contradictory testimony was

[3] Defendant Smith also raises a sufficiency of the evidence claim. We addressed the sufficiency of the evidence in § II(A), *supra*, and will not repeat that analysis here.

so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities[.]" *Id.* at 644-646 (citation omitted). That clearly is not the case here. There is nothing in the record to warrant the unusual step of overriding the jury's credibility determination. The jury's verdict is not against the great weight of the evidence. Thus, defendant Smith is not entitled to a new trial on this basis.

2. PHOTOGRAPHIC EVIDENCE

Defendant Smith argues that the prosecutor did not establish a proper foundation for the admission of the two autopsy photographs because they did not accurately depict the injuries that Glenn received during the assault. We disagree. Because this was not the basis of defendant Smith's objection to the autopsy photographs at trial, this issue is unpreserved and our review is limited to plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

"A proper foundation for the admission of photographs is made if someone who is familiar from personal observation of the scene or person photographed testifies that the photograph is an accurate representation of the scene or person." *In re Robinson*, 180 Mich App 454, 460; 447 NW2d 765 (1989). Photographs are admissible despite changes in the condition of the scene or person where a person testifies as to the extent of the changes. *Id.*

Here, the prosecution established a proper foundation by having the medical examiner who performed the autopsy testify that the photographs were accurate depictions of Glenn's injuries after the assault. With regard to the photograph of the eye, the medical examiner acknowledged that hospital records referenced a procedure whereby a cut was made to the eye to relieve pressure in the eye. The medical examiner's testimony informed the jury that the blunt force applied to Glenn's head and eye did not directly cause the surgical cut. Regarding the photograph of Glenn's skull, the jury was made aware that Glenn's scalp was peeled back during the autopsy. The medical examiner testified that Glenn's scalp was peeled back to examine the skull during the autopsy. The assistant medical examiner who testified for defendant Smith similarly testified that the skin was peeled back to expose the skull, which is "standard procedure of an autopsy." Consequently, the prosecution established a proper foundation for the admission of both autopsy photographs. Any arguments concerning the existence of inaccuracies in the photographs affected only the weight to be given the photograph, not their admissibility. *People v Curry*, 175 Mich App 33, 47; 437 NW2d 310 (1989). The trial court did not err in admitting the photographic evidence.

3. CUMULATIVE EFFECT OF SEVERAL ERRORS

We reject defendant Smith's argument that the cumulative effect of several minor errors denied him a fair trial. The only clear error that has been identified in defendant Smith's case is the prosecutor's improper statement that defendant Smith was asking the jury to convict him of manslaughter, as discussed below. That error, standing alone, did not affect defendant Smith's substantial rights because the trial court's instructions were sufficient to dispel any possible prejudice. Because multiple errors have not been found, there can be no cumulative effect that denied defendant Smith a fair trial. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

4. THE PROSECUTOR'S CLOSING ARGUMENT

A. THE PRESERVED CLAIM

As defendant Smith argues, the prosecutor improperly remarked during closing argument that "the defense is asking you to convict [defendant Smith] of a less serious crime of manslaughter." While we agree that the remark was improper, it did not deny defendant Smith a fair trial. After defense counsel approached the bench, the trial court stated that the prosecutor's remark is "absolutely not accurate. He's not asking anything." The court then specifically directed the jury to disregard the remark, and immediately instructed the jury that the lawyers' statements are not evidence and that it was to follow the court's instructions. Defendant Smith did not request any further action by the court. In its final instructions, the trial court again instructed the jury that it was to decide the case based only on the properly admitted evidence, and that the jury was to follow the court's instructions. The court's instructions were sufficient to dispel any possible prejudice from the improper remark. *Long*, 246 Mich App at 588.

B. THE UNPRESERVED CLAIMS

Defendant Smith also argues that, during closing argument, the prosecutor improperly vouched for the witnesses, aroused sympathy for Glenn, and indicated that she had special knowledge that the witnesses were truthful. Because defendant Smith did not object to any of these remarks, our review is limited to plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully, *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001), or appeal to the emotions and sympathies of the jurors. *Watson*, 245 Mich App at 591. As previously noted, however, prosecutors may argue the evidence and all reasonable inferences that arise from the evidence as it relates to their theory of the case, including that a witness is credible or worthy of belief, and they need not state their inferences in the blandest possible language. *Bahoda*, 448 Mich at 282; *Dobek*, 274 Mich App at 66. A prosecutor's mere use of the words "I believe" and "I think" during closing and rebuttal arguments does not render the arguments improper. See *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

Viewed in context, the prosecutor's remarks were based on the evidence and reasonable inferences arising from the evidence as they related to her theory of the case. *Bahoda*, 448 Mich at 282. The prosecutor did not express her personal opinion of defendant Smith's guilt or place the prestige of her office behind her arguments, but contended that the evidence proved defendant Smith's guilt beyond a reasonable doubt. The prosecutor's argument that second-degree murder, and not manslaughter, was established beyond a reasonable doubt was a reasonable inference from DB's testimony that defendant Smith hit Glenn in the head with a bottle and repeatedly stomped Glenn's head and face, and the medical evidence that Glenn's extensive injuries to his head and eye were caused by blunt force trauma. Contrary to defendant Smith's claim, the prosecutor did not ask the jury to convict defendant Smith based on emotions or sympathy. The prosecutor referenced Glenn's injuries and the autopsy photographs in addressing the severity of the injuries that Glenn incurred, which was relevant to proving that

defendant Smith had the malicious intent required to establish second-degree murder. Also, the prosecutor's argument that defendant Smith was the leader in the attack against Glenn was supported by DB's testimony that defendant Smith was the person who summoned Glenn over, hit him in the head with a bottle, and stomped Glenn before codefendant McConer joined in the attack. When making the arguments, the prosecutor urged the jury to evaluate the evidence, discussed the reliability of the witnesses' testimony, and argued that there were reasons from the evidence to conclude that defendant Smith was guilty of the charged crime. The prosecutor's arguments were not clearly improper. Further, the trial court's instructions to the jury that the lawyers' statements and arguments are not evidence, that it was to decide the case based only on the properly admitted evidence, and that it was not to let sympathy or prejudice influence their decision were sufficient to dispel any possible prejudice. *Long*, 246 Mich App at 588.

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly